United Nations A/CN.4/529

General Assembly

Distr.: General
14 January 2003

Original: English

International Law Commission
Fifty-fifth session
Geneva, 5 May-6 June and 7 July-8 August 2003

Report of the International Law Commission on the work of its fifty-fourth session (2002)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-seventh session, prepared by the Secretariat

Contents

		Paragraphs	*Page*
Introduction		1–4	5
Topical summary		5–238	5
A.	Diplomatic protection	5–49	5
1.	General comments	5	5
2.	Comments on specific issues	6–20	6
	Protection of legal persons	6–9	6
	Protection of crews and passengers	10–15	6
	Protection by international organizations exercised in respect of their officials	16–17	8
	Protection by an international organization administering a Territory	18–19	8
	Delegation of the right to exercise diplomatic protection	20	8
3.	Comments on specific articles	21–49	9
	Article 1	21–23	9
	Article 2	24	9
	Article 3	25	9
	Article 4	26–27	10

03-21712 (E) 240203
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		Article 6	28	10
		Article 7	29–30	11
		Article 10	31	11
		Articles 12 and 13	32–34	11
		Article 14	35–45	12
		Article 15	46–47	14
		Article 16	48–49	14
B.		Reservations to treaties	50–105	15
	1.	General comments	50–60	15
	2.	Role of the depositary (Draft guideline 2.1.8)	61–72	16
	3.	Role of treaty monitoring bodies (Draft guideline 2.5.X)	73–80	18
	4.	Conditional interpretative declarations	81–84	20
	5.	Draft guidelines	85–105	20
		Draft guidelines 1.1.5 and 1.1.6 (Statements purporting to limit the obligations of their author; Statements purporting to discharge an obligation by equivalent means)	85	20
		Draft guideline 1.5.1 (“Reservations” to bilateral treaties)	86	21
		Draft guideline 2.1.3 (Formulation of a reservation at the international level	87–90	21
		Draft guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations)	91	21
		Draft guideline 2.1.6 (Procedure for communication of reservations)	92–100	22
		Draft guideline 2.1.7 (Functions of depositaries)	101	23
		Draft guideline 2.3.2 (Acceptance of late formulation of a reservation)	102	23
		Draft guideline 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty)	103	23
		Draft guideline 2.5.11 (Partial withdrawal of a reservation)	104	23
		Draft guideline 2.5.12 (Effect of a partial withdrawal of a reservation)	105	23
C.		Unilateral acts of States	106–136	23
	1.	General comments	106–118	23
	2.	Classification of unilateral acts and scope of the topic	119–128	25
	3.	Approach to the topic	129–136	26

D. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities) 137–195 27

1. General comments 137–152 27

2. Scope 153–158 29

3. Role of the innocent victim, the operator and the State in the allocation of loss 159–175 30

(a) Degree to which the innocent victim should participate, if at all, in the loss 163–167 30

(b) Role of the operator 168–169 31

(c) Role of the State 170–175 31

4. Whether particular regimes should be established for ultra-hazardous activities 176–179 32

5. The threshold for triggering the regime of allocation of loss 180–182 32

6. Inclusion of the harm caused to the global commons 183–186 33

7. Models for allocation of loss 187–192 33

8. Procedures for processing and settling claims of restitution and compensation 193–195 34

E. Responsibility of international organizations 196–214 35

1. The Commission’s decision to include the topic in its programme of work 196 35

2. Report of the Working Group 197–214 35

(a) Scope of the topic 198–203 35

(i) The concept of responsibility 198–200 35

(ii) The concept of international organizations 201–203 35

(b) Relationship between the topic of responsibility of international organizations and the articles on State responsibility 204–205 36

(c) Questions of attribution 206–207 37

(d) Questions of responsibility of member States for conduct that is attributable to an international organization 208–210 37

(e) Other questions concerning the responsibility of an international organization 211 38

(f) Questions of content and implementation of international responsibility 212 38

(g) Settlement of disputes 213 39

(h) Practice to be taken into consideration 214 39

F. Fragmentation of international law: difficulties arising from the diversification and expansion of international law 215–234 39

1. General comments 215–229 39

(a) Support for study of the topic 215–223 39

(b) Methodology and format of work 224–229 41

2. Comments on the recommendations of the Commission 230–234 42

G. Other decisions and conclusions of the Commission 235–238 43

Introduction

1. At its fifty-seventh session, the General Assembly, on the recommendation of the General Committee, decided at its 19th plenary meeting, on 20 September 2002, to include in the agenda of the session the item entitled “Report of the International Law Commission on the work of its fifty-fourth session” and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 20th to 28th meetings, from 28 to 31 October, and from 1 to 7 November 2002. The Chairman of the International Law Commission at its fifty-fourth session introduced the report of the Commission: chapters I to III and chapter V at the 20th meeting on 28 October; chapter IV at the 22nd meeting, on 29 October; chapter IV at the 22nd meeting, on 31 October; and chapters VI to X at the 23rd meeting, on 1 November. At its 28th meeting, on 7 November, the Sixth Committee adopted draft resolution A/C.6/57/L.27, entitled “Report of the International Law Commission on the work of its fifty-fourth session”. The draft resolution was adopted by the General Assembly at its 52nd plenary meeting, on 19 November 2002, as resolution 57/21.

3. By paragraph 18 of resolution 57/21, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the International Law Commission at the fifty-seventh session of the Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of seven sections: A. Diplomatic protection; B. Reservations to treaties; C. Unilateral acts of States; D. International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities); E. Responsibility of international organizations; F. Fragmentation of international law: difficulties arising from the diversification and expansion of international law; and G. Other decisions and conclusions of the Commission.

Topical summary

A. Diplomatic protection

1. General comments

5. Support was expressed for the Commission’s work thus far on the topic, which was considered to represent a solid basis for codification, reflecting customary international law while incorporating some progressive developments, and as being both practical and flexible. Support was also expressed for confining the draft articles to issues relating to the nationality of claims and the exhaustion of local remedies rule so that consideration of the topic could be finalized during the quinquennium. However, others voiced their concern that the Commission’s work on diplomatic protection showed a tendency to include elements which lay outside the scope of the topic. A preference was thus expressed for the Commission limiting itself to codifying State practice and customary rules deriving from such practice.

2. Comments on specific issues

Protection of legal persons

6. With regard to the protection of shareholders' interests in the light of the judgment of the International Court of Justice in the *Barcelona Traction* case,[1] it was observed that the basic rule was that diplomatic protection on behalf of a company should primarily be exercised by the State of nationality of the company. In an era when share ownership could be transferred instantaneously, allowing the States of nationality of the shareholders to exercise it would jeopardize legal certainty and predictability. Moreover, because multinational companies could have millions of shareholders in different countries, there might well be no majority of shareholders in any one country. To overturn the general rule established in the *Barcelona Traction* case would thus cause added confusion. Moreover, the inability to claim protection from their own country was among the commercial risks assumed by shareholders when buying shares in a foreign company. In terms of another view, the nationality of shareholders should be taken into consideration in deciding whether to extend diplomatic protection to a corporation in respect of unrecovered losses to shareholders' interests in a corporation which was registered or incorporated in another State and was expropriated or liquidated by the State of registration or incorporation, or of other unrecovered direct losses.

7. It was further observed that the *Barcelona Traction* decision did not exclude exceptions, and reference was also made to the case law of the Iran/United States Claims Tribunal and the decisions of the United Nations Compensation Commission. Nor did it preclude the application of specific treaty-based rules in accordance with agreements on the protection of foreign investments. It was suggested that any such exceptions should be clearly stipulated.

8. Others observed that the *Barcelona Traction* decision had raised doubts regarding the protection of shareholders and had led to a proliferation of bilateral investment treaties, which provided such protection. It was therefore difficult to imagine a circumstance in which shareholders' State of nationality should be entitled to exercise diplomatic protection. A reluctance was also expressed regarding the exercise of such protection on behalf of the majority of shareholders in a company by their State of nationality, which could result in the discriminatory treatment of small shareholders, and it would be difficult to establish a quantitative standard for such a distinction. Likewise, the view was expressed that it would be difficult to reconcile the idea of the State of nationality of the majority of shareholders in a company having a "secondary" right to exercise diplomatic protection if the State of incorporation refused or failed to do so, with the discretionary power of the company's State of incorporation.

9. Others expressed the concern that extending the scope of the study to the diplomatic protection of legal persons would delay its completion.

Protection of crews and passengers

10. Concerning the protection of vessels and their crews and passengers in the light of the judgement of the International Tribunal for the Law of the Sea in the

[1] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3.

M/V "Saiga" (No. 2) case,[2] it was observed that the issue related to the relationship between applicable principles and rules of the international law of the sea, and the rules on diplomatic protection. Support was expressed for the Special Rapporteur's view that the scope of the draft articles should not encompass the right of the State of nationality of a ship or aircraft to bring a claim on behalf of its crew or passengers. It was pointed out that diplomatic protection was not necessary where a crew member of a ship or aircraft of the flag State or State of registry was injured by an internationally wrongful act of another State; the former State was deemed to have been injured and could bring a claim directly against the latter State. The concern was also expressed that the inclusion of the issue would prevent the Commission from concluding its work on the topic.

11. The view was expressed that the issue was already adequately covered by the United Nations Convention on the Law of the Sea (UNCLOS), including by article 94, which set out the duties of the flag State. It was pointed out that the purpose of article 292 of the Convention was to ensure the prompt release of vessels and their crews in cases of detention of a ship by a non-flag State, and to provide modalities for the submission of any dispute to a competent court. As such, the article did not establish, expand or modify the institution of diplomatic protection. Moreover, the International Tribunal for the Law of the Sea had made no reference to diplomatic protection. Similarly, the legal principles relating to the nationality of aircraft were already set out in various instruments in international law and thus had no place in any consideration of the topic of diplomatic protection.

12. Others pointed out that UNCLOS did not provide a clear rule on diplomatic protection, since at the time the Convention had been negotiated the issue had been thought to be a matter of general international law. Article 292 of the Convention, on prompt release of vessels and crews, stipulated that only the flag State was competent to raise a claim, but that article dealt with a special case, subject to particular conditions not generally applicable. The view was also expressed that general conclusions could indeed not be drawn from the *M/V "Saiga" (No. 2)* case. Even if the claims in question were to be regarded as cases of diplomatic protection, they were a *lex specialis*. The suggestion was therefore made that the draft articles should include a *lex specialis* saving clause.

13. It was also suggested that, in the case of problems which could not be resolved under article 292 of the Law of the Sea Convention, it would be open to the State of nationality to exercise diplomatic protection. However, if the flag State was already dealing with the port State in the context of article 292, it would make sense for the other States of nationality to defer to the flag State if the latter was willing to bring a claim on behalf of all the crew members; such a solution would ensure equal treatment rather than relying on the willingness or ability of the various States of nationality to exercise diplomatic protection.

14. According to a further view, there could be other grounds, such as human rights grounds, for exercising diplomatic protection with regard to foreign crew members or passengers. It was therefore suggested that, in principle, diplomatic protection by the flag State should cover the interests of all crew members and passengers, although in some cases it might be exercised by their State of

[2] *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, Judgement of 1 July 1999.

nationality. Protection by other States might become necessary where it was obvious that flag State jurisdiction would not be effectively exercised, as in the case of certain flags of convenience.

15. Others expressed the view that, while it might be possible to address the question of whether the crew of vessels at sea were treated, for purposes of diplomatic protection, as if they were nationals of the flag State, any attempt on the part of that State to exercise diplomatic protection must be restricted to those crew members and should not include the vessel's passengers or the crews of aircraft and spaceships.

Protection by international organizations exercised in respect of their officials

16. As regards the protection exercised by international organizations in respect of their officials, the view was expressed that such protection should be characterized as functional rather than diplomatic protection. Indeed, it was maintained that, since no link of nationality existed, the issue did not fall within the sphere of diplomatic protection. Such functional protection was usually based on specific legal instruments. In addition, it was pointed out that, since the Commission had excluded protection of diplomatic and consular officials from the scope of the topic, the same logic would apply to officials of international organizations.

17. Others maintained that, even if it were called functional, rather than diplomatic, such protection exercised by international organizations on behalf of their officials was in fact related to diplomatic protection and might well be subject to the same general conditions. It was further suggested that the Commission could consider clarifying the question of competing claims that might be made by an organization and by the State of nationality for an individual employed by that organization.

Protection by an international organization administering a Territory

18. With regard to the possibility of the exercise of diplomatic protection by an international organization administering a Territory, the view was expressed that such situations were typically temporary in nature and would best be considered in the context of the topic of the responsibility of international organizations. The view was also expressed that the draft articles should not cover situations in which a State that occupied, administered or controlled a Territory other than its own sought to exercise diplomatic protection on behalf of the Territory's inhabitants. Since such occupation would be illegitimate under international law, there could be no right to exercise diplomatic protection.

19. Others were of the view that the exercise of diplomatic protection by a State or international organization which administered or controlled a Territory merited further discussion, taking into consideration the existing precedents and the risk that the Territory's inhabitants might otherwise be left without any diplomatic protection at all.

Delegation of the right to exercise diplomatic protection

20. The view was expressed that the delegation of the right to exercise diplomatic protection to other States was an issue deserving attention. The example was cited, by analogy, of the right of States members of the European Union to grant consular

and diplomatic protection to nationals of another member State if the latter was not represented in a third country. Others were of the view that cases in which one State delegated to another the right to exercise diplomatic protection seldom arose in practice, and could be dealt with in the commentaries.

3. Comments on specific articles

Article 1

21. Support was expressed for the approach taken in article 1, which was considered consistent with the theory and practice of customary international law.

22. The criterion of injury to the national of a State as enunciated in paragraph 1 was considered acceptable since the State itself had in fact been injured through the intermediary of its national. However, the view was expressed that the term "action" was unclear. It was furthermore proposed that a clear distinction should be made between diplomatic protection and the general protection which a State could always provide to its citizens abroad in the form of diplomatic or consular assistance. It was also suggested that a clear definition should be included of the nationality link, and of the few exceptions to that principle under contemporary international law.

23. As regards paragraph 2, it was suggested that it be reformulated so as to make it clear that diplomatic protection in respect of non-nationals constituted an exception to the general nationality of claims rule. Under a further view, paragraph 2 raised serious questions since the statement that diplomatic protection could be exercised in respect of a non-national called into question the idea, expressed in paragraph 1, that the State suffered harm only through injury to its national, and thereby departed from the traditional concept of diplomatic protection.

Article 2

24. With regard to article 2, support was expressed for the position that the right to invoke diplomatic protection lay with the State, not with the injured person. It was suggested that it would be sufficient to indicate that a State which decided to exercise diplomatic protection should do so in accordance with the draft articles. The view was also expressed that draft article 2 only reiterated the principle laid down in the preceding article.

Article 3

25. In expressing support for article 3, it was pointed out that in the *Nottebohm* case,[3] the International Court of Justice had not propounded proof of an effective link between the State and its national as a general rule, but rather as a relative rule to be applied to the specific situation of dual nationality embodied in that case. Support was expressed for defining nationality in a formal sense, since the *Nottebohm* requirement complicated the exercise of diplomatic protection in an increasingly globalized world where for economic, political or other reasons, millions of people who lived and worked outside their States of origin did not possess the nationality of their host States. It was further suggested that the concept of acquiring the nationality of the claimant State "in a manner not inconsistent with international law" should have been developed further in the commentary.

[3] *Nottebohm case, I.C.J. Reports 1955*, p. 24.

Article 4

26. Support was expressed for the proposed requirements for continuous nationality in article 4. It was pointed out that the validity of the rule of continuous nationality was to be examined in the light of the numerous exceptions made to that principle in recent case law and the trend towards the recognition of individual rights in current international law. It was thus advisable to allow some exceptions to that principle in order to deal with possible situations in which persons were unable to obtain diplomatic protection from any State. Those exceptions could be based on a distinction between voluntary changes in nationality at the individual's choice and involuntary changes of nationality deriving from a succession of States, marriage, descent or adoption. Others considered the provision to be ambiguous, and called for greater clarification of the phrase "in a manner not inconsistent with international law".

27. Still others considered the provision to be unacceptable. By proposing that a State should be able to present a claim on behalf of a person who acquired the nationality of that State in a manner not inconsistent with international law, the Commission had challenged the well-established rule of international law that in exercising diplomatic protection, the State asserted its own rights, which presupposed that the protected person must have been a national of that State at the time of the violation. As such, the provision reflected a human-rights-based approach which was inappropriate to the topic under consideration. Instead, it was suggested that the Commission should focus on conditions for the opposability of nationality rather than seeking to define the nationality link in the case of physical and moral persons, as it had done in draft article 3, paragraph 2, or the conditions for granting nationality. It was also maintained that as *lex ferenda*, the draft article should be revised as it jettisoned the requisite link of nationality beyond the date on which the claim was presented and dispensed with any continuity requirement. Indeed, it was observed that although the word "continuous" appeared in the title of the article, it was not in the text. Furthermore, the concern was expressed that paragraph 2 established an overly broad exception.

Article 6

28. The view was expressed that, while the principle embodied in the provision was acceptable and enjoyed considerable support in practice, draft article 6 was problematic in that it was difficult to establish the predominance of one nationality over another. Indeed, the Commission proposed no criteria for making such a judgement. It was also noted that, in practice, the dominant nationality doctrine had been upheld only after major crises when it was necessary to compensate for harm suffered by national economies by dividing the total damage into a series of individual claims, a situation which might not be classified as diplomatic protection. It was further proposed that the concept of predominant nationality should be elaborated upon, preferably in the text itself, by adding the following as an additional paragraph: "For purposes of paragraph 1, the predominant nationality shall be deemed to be the nationality of the State with which the person had the strongest effective links on the dates indicated." Under a further suggestion, the term "effective nationality" was preferable to "predominant nationality".

Article 7

29. Support was expressed for the inclusion of the draft article, contemplating the exercise of diplomatic protection on behalf of refugees and stateless persons, which was described as a laudable example of the progressive development of international law. The view was expressed that the provision struck a good balance between the discretionary nature of a State's right to exercise diplomatic protection and the need to ensure an effective remedy. Support was further expressed for the position taken in the commentary that the term "refugee" was not limited to the definition given in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol but was intended to cover, in addition, persons who did not strictly conform to that definition. Likewise, the decision to set a higher threshold for diplomatic protection on behalf of refugees and stateless persons by requiring lawful and habitual residence, was welcomed. Others were of the view that the requirement of both lawful and habitual residence set a threshold that was too high. It was also suggested that the requirement of recognition of refugee status should be deleted as the requirement of lawful presence would suffice to prevent abuse. Under another view, it was appropriate to specify that refugees must be recognized as such by the State at the time of the injury and at the date of the official presentation of the claim. It was also observed that the formulation did not account for the "safe third country" rule, where a person, having been refugee status in one State, emigrates to a second State to live without being granted refugee status there. As such, the continuity of habitual residence thus seemed too strict a requirement.

30. Others were of the view that the draft article was in direct violation of some provisions of the Convention relating to the Status of Refugees. It was maintained that the diplomatic protection envisaged for stateless persons and refugees under draft article 7 was an undesirable extension of diplomatic protection which could be conducive to mischief by the State of habitual residence of a refugee. It was also observed that representations might be made on behalf of such persons only in exceptional cases.

Article 10

31. It was observed that the draft article implied that the exhaustion of local remedies rule applied only when a State contemplated bringing an international claim. However, the concept of an international claim by a State differed from the broader concept of diplomatic protection, defined in draft article 1 as consisting of "resort to diplomatic action or other means of peaceful settlement" and hence comprising non-judicial means. Under this view, the exhaustion of local remedies rule was relevant to the exercise of diplomatic protection by judicial means, but excessive if a State wished to resort to non-judicial means.

Articles 12 and 13

32. Agreement was expressed with the view that articles 12 and 13 of the draft articles submitted by the Special Rapporteur were unnecessary. The question of whether the exhaustion of local remedies was a matter of substance or of procedure was considered to be academic. It was observed that article 12 raised a theoretical problem that did not contribute to the solution of practical problems, and that article 13 dealt with denial of justice, which was a matter for the primary rules. It was also maintained that draft articles 12 and 13 were superfluous in the light of draft articles

10 and 11. Therefore, support was expressed for the prevailing view in the Commission that draft articles 12 and 13 should be deleted as adding little to draft article 11.

33. Others opposed the Commission's decision not to refer articles 12 and 13 to the Drafting Committee. Under this view, the determination of the nature of the local remedies rule could have a major impact in a large number of cases. It was also suggested that the issue could at least be dealt with in the commentary to draft article 10. It was furthermore proposed that the issue might be dealt with by rewording draft article 10, paragraph 1, by inserting, after the words "injury to a national, whether a natural or legal person", the words "and whether or not the injury by itself constitutes a violation of international law".

34. Support was further expressed for the position advocated by the Special Rapporteur in draft articles 12 and 13, which drew a distinction between an injury to an alien under domestic law and an injury under international law. That distinction was considered relevant, and support was expressed for the third, "mixed" position, i.e. that the exhaustion of local remedies should be treated as a procedural matter if it violated both local and international law but as a substantive matter if a State's responsibility was triggered by a denial of justice. It was further proposed that the Commission should also examine the practice of the European Court of Human Rights.

Article 14

35. The Commission was commended for having referred draft article 14 to the Drafting Committee. It was observed that since the exhaustion of local remedies was already widely accepted as a rule of customary international law governing diplomatic protection, the Commission should be careful to strike a proper balance between that rule and any exceptions to it. Such exceptions should meet explicit criteria and their application should be clearly defined. It was also suggested that objective terminology should be found to replace the expressions "effective remedy" and "undue delay". Under a further view, the traditional interpretation of exceptions to the exhaustion of local remedies rule must be reviewed in the light of the increasing protection of individual rights by international law.

36. As regards subparagraph (a), although some support was expressed for option 2 ("offer no reasonable prospect of success"), most speakers favoured option 3 ("provide no reasonable possibility of an effective remedy"). It was observed that whether such remedies were effective or not would raise questions about the standard of justice in a given State, but so long as they conformed with the principles of natural justice, variations in standards should not call their effectiveness into question. It was proposed that whatever option the Commission adopted in respect of article 14, subparagraph (a), it should be accompanied by examples illustrating the scope and application of that provision. It was further suggested that the Special Rapporteur should examine the recent jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights.

37. Other suggestions included rewording subparagraph (a) to reflect the idea that a domestic remedy must be exhausted only if there were sound reasons for believing that there was a reasonable prospect of success, or that local remedies need not be exhausted where there was no reasonable possibility of an appropriate remedy.

38. Regarding subparagraph (b), while support was expressed for express waivers constituting an exception to the rule, the view was expressed that the provision should avoid any express mention of estoppel or similar legal concepts. Instead a waiver should be clear, attributable to the State and made known to the individual concerned, and the intent to waive must be clearly evinced by a respondent State's agreement or conduct.

39. Concern was expressed regarding the notion of implied waiver. It was observed that there was a danger that such a waiver could be used by more "interventionist" States as a pretext for dispensing with the local remedies rule altogether. Its application should therefore be limited to cases where an impartial observer would have no doubt that the respondent State had indeed intended to waive the rule. It was proposed that the Commission should use caution when dealing with implied waiver and, for example, provide clear examples of such waivers. Under a further view, unless the problems relating to implied waivers and estoppel could be solved, subparagraph (b) should be deleted.

40. With regard to subparagraphs (c) and (d), concerning the voluntary link and territorial connection requirements, while support was expressed for the provisions as proposed by the Special Rapporteur, others were of the view that it seemed unnecessary and inappropriate to attempt to codify the voluntary link between an injured individual and the respondent State. The concept had not taken root in case law, and it would be wiser to leave it to the courts to determine whether there was a sufficient link with the territorial State to give that State the first opportunity to provide reparation. It was thus suggested that the issue would be best dealt with in the commentary to article 14.

41. According to another view, the voluntary link requirement was consistent with existing practice. It was observed, however, that the link had never been equated with residence and did not necessarily entail the physical presence of the injured party in the territory of the respondent State; it could also take the form of ownership of property or a contractual relationship with that State. It was pointed out that in certain situations, such as the shooting down of an aircraft, it would be impracticable and even unfair to insist on the existence of a voluntary link, thus imposing on an injured alien the requirement that local remedies should be exhausted. The same applied to the infliction of transboundary environmental harm.

42. The view was expressed that a general rule on territorial connection should not be included among the grounds for limitation, but it should be made clear that exhaustion of local remedies was not required if the effect of the injury fell outside the territory of the respondent State, as in the case of transboundary environmental harm.

43. Others were of the view that the concepts of voluntary link and territorial connection reflected in subparagraphs (c) and (d) should be considered in greater detail in the context of draft articles 10, 11 and 14, subparagraph (a).

44. As regards subparagraphs (e) and (f), relating to undue delay and denial of access, respectively, support was expressed for the inclusion of the exception relating to undue delay, which might be intentional, since such delay amounted to a denial of justice. Under another view, the concept of undue delay was too broad; it must be clearly stated that the exception to the local remedies rule was applicable only if the delay was so great that it amounted to a denial of justice.

45. Others were of the view that undue delay and the denial of access should be considered in conjunction with the question of the futility of local remedies, in subparagraph (a). It was further observed that judicial proceedings were more protracted in some countries than in others, often unavoidably. Delays should therefore not be considered a violation of international law or a reason for making the exhaustion of local remedies rule an exception.

Article 15

46. Support was expressed for the Commission's decision not to include draft article 15, concerning distribution of the burden of proof, in the draft articles since general rules on the burden of proof did not require the formulation of a special rule. It was observed that the rules governing the inadmissibility of evidence were normally covered by national legislation or developed by international judicial bodies. It was also noted that differences existed in common law and civil law systems with regard to the burden of proof. In addition, it was questionable whether human rights jurisprudence developed on the basis of specific treaty provisions within the framework of a procedural system was relevant to the delineation of proof in general international law.

47. Others were of the view that the inclusion of article 14, subparagraph (a), would make it necessary to include rules dealing with the burden of proof. It was also observed that it could provide States and dispute resolution bodies with useful guidance on the burden of proof in the context of the exhaustion of legal remedies. Another suggestion was to include such a provision as part of a closing section on how diplomatic protection should be exercised.

Article 16

48. Support was expressed for the Commission's decision not to include a provision on the Calvo clause, as had been proposed by the Special Rapporteur in draft article 16. The view was expressed that the clause was essentially a contractual device related to the application of law rather than to its codification. It was pointed out that the provision was of no practical use, since the draft articles in their entirety were built on the classic fiction that gave States the right to exercise diplomatic protection. It was further observed that the practical usefulness of the clause was diminishing in the globalized economy where the priority of most States was to attract foreign investment.

49. Others were of the view that there was no difficulty in including an article that viewed the contractual stipulation as a valid waiver of the right to request diplomatic protection in respect of matters pertaining to the contract, provided that the right of the State of nationality to exercise diplomatic protection irrespective of the waiver was not affected. The Commission was therefore encouraged to continue to consider how the Calvo clause might be incorporated in the draft articles. It was suggested that a provision might be included limiting the validity of the "Calvo clause" to disputes arising out of the contract containing the clause, without precluding the right of a State to exercise diplomatic protection on behalf of its nationals.

B. Reservations to treaties

1. General comments

50. Many delegations, noting the progress having been made on the topic, expressed the hope that the project would be completed during the current quinquennium. Several delegations reiterated the expression of their interest in the topic. They believed that the Guide to Practice would be of great practical value to Governments and international organizations. In this context it was suggested that the Commission should shorten some of its commentaries, since lengthy commentaries on non-controversial matters might give the impression that the law was less clear or more complex than it really was. Too much detail affected negatively the necessary balance between the codification of existing principles of international law and its progressive development.

51. It was stated that reservations should never be used to undermine respect for the object and purpose of the treaty; they could be helpful in achieving wide acceptance of a treaty. Delegations hoped that the delicate issue of impermissible reservations would be treated by the Special Rapporteur in the same way in which he had dealt with other aspects of the topic, rather than being referred to a working group. Particular importance was attached to the question of the admissibility of reservations and their legal consequences. The Commission should also consider closely the matter of reservations containing general references to domestic law (without any further description of that law) and the question of whether or not a reservation had to be autonomous in the sense of providing sufficient information to enable other States to consider its intended legal consequences and, eventually, make objections. Parties to a treaty shared a common interest in ensuring that common norms were not diluted.

52. While some delegations supported the concept of a periodic review of reservations with the aim of facilitating their withdrawal at any time, others had doubts whether such a provision should be included in a guide intended to frame legal rules.

53. The criterion for distinguishing interpretative declarations from reservations was considered acceptable provided that it was based rather on the objective effects of the statement than on the subjective intentions of the State making it. It would also be desirable, for the sake of legal certainty, for interpretative declarations to be made within a limited period from the date of the expression by the State of the consent to be bound.

54. Delegations also supported the rule that reservations should be made in writing and by persons duly authorized to undertake international treaty responsibilities on behalf of the State.

55. Various delegations commended the role of human rights treaty bodies in protecting the integrity of the conventions concerned. A recent example was the report by the secretariat of the Committee on the Elimination of Discrimination against Women on ways and means of expediting the work of that Committee.[4] They also welcomed the work of Françoise Hampson within the Sub-Commission on the

[4] CEDAW/C/2001/II/4.

Promotion and Protection of Human Rights and hoped for a successful outcome to the consultations between her and the Commission.

56. On the other hand, concern was expressed about the work on reservations initiated by the Sub-Commission on the Promotion and Protection of Human Rights. The Commission was undoubtedly the appropriate forum for consideration of the topic and its advocacy of close cooperation with the human rights treaty bodies in order to avoid duplication (and the danger of fragmentation and contradictory results) was supported.

57. The view was also expressed that the draft guidelines on reservations to treaties constituted a source of codification and progressive development for aspects of reservations which had not yet been regulated. Progressive development of the procedures involved in making reservations was an important means of encouraging wide accession to treaties. It was pointed out that the Commission was wise not to undertake a major revision of the Vienna regime, which had functioned well and had encouraged universal adherence to multilateral treaties. The guidelines should be assessed in the light of their compatibility with the Vienna regime. According to another view, the Guide to Practice should not simply reproduce the provisions of the Vienna Convention but should be designed to be read and applied on its own. It should also embody relevant customary rules pertaining to treaties.

58. The opinion was voiced that the draft guidelines provisionally adopted by the Commission seemed well balanced and respected both the autonomy of the reserving State and the interests of other contracting parties and the international community. The fact that the draft guidelines covered interpretative declarations in respect of bilateral treaties was a source of satisfaction. The rule that acceptance of such a declaration constituted the authentic interpretation of a bilateral treaty amounted to progressive development of treaty law and deserved further scrutiny.

59. In that respect, a concern was expressed that draft guidelines on late formulation of reservations might give rise to abuses and violate the integrity of the norms of the Vienna Convention on the Law of Treaties.

60. Delegations welcomed the draft guidelines proposed by the Special Rapporteur on the partial withdrawal of reservations, feeling that such innovations would provide a further element of flexibility in relations between States.

2. Role of the depositary (Draft guideline 2.1.8)

61. Some delegations were of the view that in cases of manifestly impermissible reservations, the depositary should have competence to indicate to the State making the reservation that it was impermissible (including reservations potentially incompatible with the purpose and object of the treaty). Unless the State concerned withdrew its reservation, the depositary should inform all the parties about its communication with the State in question. Whether the depositary, when transmitting the impermissible reservation to other States parties, should also communicate to them the reasons for his finding was an open question. There should be clear criteria for determining which reservations were impermissible and the goal of safeguarding the integrity of a multilateral treaty should prevail.

62. Other delegations thought that the range of powers of the depositary was authoritatively delineated in the Vienna Convention on the Law of Treaties. Only States and international organizations that were parties to a treaty, and not the

depositary, who should be impartial and neutral in the exercise of his functions, could decide whether a statement constituted a reservation and whether or not such a reservation was admissible and, accordingly, raise objections. The depositary should only communicate the statement to all contracting parties and signatory States. Otherwise, the depositary would be transformed into a monitoring body, and could lose his neutral "post office" character, and that would be wrong *de lege lata* and undesirable *de lege ferenda*.

63. According to another view, the draft guideline went a step beyond the Vienna Conventions. Any draft guideline on the subject should be in accordance with treaty rules as embodied in those Conventions since the Commission was not preparing a new treaty but only a set of draft guidelines based on existing treaty regulations.

64. The view was expressed that the text rightly distinguished between absolute illegality, where the reservation was manifestly illegal and the depositary should be entitled to react, and relative illegality, which was still to be established and where only States parties had the right to act.

65. The text, however, did not clearly specify the powers of the depositary. If the depositary was entitled to withhold the communication of the reservation to the other States parties while awaiting the reaction of the reserving State, it should be advisable to reflect it in the wording of the guideline. The final decision would depend on the outcome of the work concerning the legal status of illicit reservations. In any event, a clear definition was needed of the kind of reservation regarded as "manifestly impermissible".

66. On the other hand, if the depositary were to intervene on the question of compatibility of the reservations with the object and purpose of the treaty, such interference might prompt the States to react, which would not help to resolve the problem. It was not obvious that the depositary, rather than the States parties, was in a position to determine whether a reservation was incompatible with the object and purpose of a treaty. This would make him more of an umpire than a facilitator. Yet according to another view the depositary was not even entitled to assess whether reservations were submitted in due and proper form. Consequently, the second sentence of draft guideline 2.1.8 (if not the entire guideline) should be deleted since it created more difficulties than it resolved.

67. Other delegations agreed with the Commission that no form of censorship by the depositary could be allowed. They were unwilling to oblige the depositary to play any wider role. The depositary could share his opinion on a reservation with the reserving State, but no action by the depositary could alter the fact that ultimate responsibility for the integrity of a treaty lay with the States parties. If problems of form were noted, the depositary should merely return the reservation to the State without comment.

68. Several delegations agreed with the emphasis placed on the purely administrative role of the depositary. The depositary should not be required to assess the validity of even obviously unlawful reservations. Moreover, the example of international treaties with more than one depositary was an additional factor in favour of a restrictive approach to the competences of depositaries. Serious problems could be created from different interpretations and applications of the powers of depositaries of the same treaty.

69. It was also pointed out that the depositary should not get involved in an unwarranted debate with the reserving State as to whether a reservation was compatible with the object and purpose of the treaty, especially since States entered into a reservation after giving it serious consideration. It was thus highly unlikely that a more active role of the depositary would lead to the withdrawal of the reservation.

70. Some delegations supported the monitoring role of the depositary as proposed in draft guideline 2.1.8. Even while apparently quite formal evaluations could not be wholly detached from substantive considerations, the substantive evaluative process must remain the prerogative of States parties. Draft guidelines 2.1.7 and 2.1.8 were not meant to authorize the depositary to make any judgement on the form or substance of reservations, but only to perform a useful service to the contracting parties. The view was expressed that the depositary could be required, in future, to carry out a substantive evaluation, provided that in the event of a disagreement about the depositary's performance of his duties, the matter was referred to the contracting States or international organizations concerned. It would be extremely useful for the depositary to draw the attention of a reserving party, where necessary, to the manifest impermissibility of its reservation, and this function should not be confined only to reservations expressly forbidden by the treaty. Even in such cases, questions of interpretation might arise which in turn raised issues of substance. If the reservation was confirmed despite the depositary's observations, the latter should communicate the reservation to the parties, annexing to his communication the text of the exchange of views. This more active role of the depositary should be properly interpreted: in some cases depositaries might prefer to engage in informal dialogue with a reserving State. The States parties would in any case retain the right to object to a reservation which they themselves regarded as impermissible.

71. It was felt that this dialogue between the reserving party and the depositary was likely to be a useful process for all concerned, to be carried out with sensitivity on both sides and, in most cases, to succeed in resolving the issue. The foreign ministries of many small countries lacked the resources to verify the permissibility of every reservation of which they were notified, but a note from the depositary would serve the purpose of drawing attention to the possible need to take a position on the reservation in question.

72. According to another view, the functions of the depositary in connection with an impermissible reservation should be exercised restrictively and might be limited to reservations that were prohibited in the treaty itself or to purely objective cases in which the impermissibility was self-evident. The depositary should not have the power to make a finding as to whether a reservation was consistent with the purpose of the treaty.

3. Role of treaty monitoring bodies (Draft guideline 2.5.X)

73. Several delegations were favourable to the withdrawal of draft guideline 2.5.X at the current stage of the Commission's work. It was felt that the matter should be discussed again in the context of impermissible reservations. Moreover, it was pointed out that the correct position was that the conclusions of a monitoring body as to the status or consequences of a particular reservation were not "determinative" unless the treaty provided otherwise.

74. Whatever the role and powers of monitoring bodies, it was difficult to see how their activities could affect the withdrawal of a reservation. It was also possible that the reserving State's consent to be bound by a treaty was strictly subject to the reservation. Should the reserving State be forced to withdraw its reservation, it might feel compelled to denounce the treaty altogether. Withdrawal of the reservation was a sovereign prerogative of the State and no other entity could detract from its discretion in that matter.

75. The view was also expressed that a finding by a monitoring body that a reservation was unlawful might render the reservation void, but could not bring about its withdrawal or cancellation. The author of the reservation could withdraw it but it could also denounce the treaty. It was unclear whether States parties to the treaty could retroactively require the reserving State to perform the treaty obligation which was the subject of the reservation. Further reflection was required on those points as well as on which bodies were envisaged, what was the legal basis for their judgement of impermissibility, what consequences should flow from such judgement, whether there was a legal basis for obliging States to act on the findings of monitoring bodies and whether there was any relationship between such a body's finding and a depositary's opinion that a reservation was manifestly impermissible. This reconsideration should be made in the light of the provisions of the Vienna Convention, the practice of the treaty monitoring bodies and State practice. According to other delegations, where there was a body responsible for monitoring the implementation of a treaty, it could play a role in evaluating reservations. However, it was difficult to see the purpose of proposing, as did draft guideline 2.5.X, a definition of the consequences of a finding on the part of the monitoring body of the impermissibility of a reservation.

76. The prerogatives of monitoring bodies (as well as the functions of depositaries) should be approached with great caution. It was necessary to start from the assumption that unless the parties to an international treaty had agreed otherwise, neither the monitoring bodies nor the depositary should make judgements concerning reservations to that treaty.

77. The view was also expressed that there was no clear definition of the concept of "a body monitoring the implementation of the treaty". Such a body could be a judicial organ or a committee and accordingly its decisions might be binding or only constitute recommendations. Review by a monitoring body did not change the treaty relations among the contracting States, nor did it necessarily lead to the withdrawal of a reservation, which was the right of the reserving State. The Guide to Practice should stipulate which types of bodies could assume that role, bearing in mind the need to maintain a balance between the universality and the integrity of treaties. The Commission's preliminary conclusions of 1997 took a balanced approach to the issue. The competence of monitoring bodies to pronounce on the validity of a reservation depended upon the powers assigned to them by the treaty in question. A distinction should be drawn between a treaty body having judicial functions and one devoid of such power.

78. However, the monitoring body's finding of impermissibility might amount to a finding of invalidity and the reserving State or international organization must act accordingly by denouncing the treaty or withdrawing all or part of the reservation. In any event, a bona fide reserving State would be forced to seriously reconsider its position in the light of objective assessments of human rights treaties' independent

monitoring bodies. The system of objections and acceptances provided for by the Vienna Convention could also offer valuable support to a monitoring body in its interpretation of the admissibility of a reservation.

79. According to another view, the finding of impermissibility by a treaty monitoring body should imply that the other States parties to the treaty should not individually accept or reject the reservation. The reserving State would then be required to withdraw it.

80. Under still another view, however, draft guideline 2.5.X might be useful.

4. Conditional interpretative declarations

81. Several delegations were of the view that to frame rules for conditional interpretative declarations as a separate legal category would create confusion and would serve to condone a practice that had developed largely as a way of circumventing the rules of the law of treaties. The suggestion was made to delete the draft guidelines concerning such declarations. Instead of being treated as a separate category, conditional interpretative declarations should be equated to reservations. Where a treaty had been negotiated as a balance of interests and deliberately prohibited reservations, careful thought should be given to whether States should be able to become parties subject to a particular interpretation of that instrument.

82. According to another point of view, the draft guidelines should distinguish clearly between simple and conditional interpretative declarations, stating explicitly in each relevant guideline whether both types were covered or only one. (For example, draft guideline 1.3.1 would apply only to conditional interpretative declarations, while draft guidelines 1.3.2, 1.5.3 and 1.7.2 should apply to both categories.)

83. Draft guidelines 1.2 and 1.2.1 could be combined in a single text entitled “Interpretative declarations” (for the text, see A/C.6/57/SR.23, para. 12).

84. Draft guideline 1.5.3 should apply also to multilateral treaties. Moreover, simple interpretative declarations did not require confirmation. According to the same view, the procedure of draft guideline 2.1.8 might apply, mutatis mutandis, to conditional interpretative declarations in cases where the interpretation of treaty contained in such declaration was manifestly unfounded. In the same vein, the words “purporting to interpret the same treaty” in draft guideline 1.7.2 should be replaced by the words “purporting to specify or clarify its meaning”, since only the parties to a treaty were entitled to interpret it and the interpretation could not be contained in a provision of the treaty itself.

5. Draft guidelines

Draft guidelines 1.1.5 and 1.1.6 (Statements purporting to limit the obligations of their author; Statements purporting to discharge an obligation by equivalent means)

85. It was observed that draft guidelines 1.1.5 and 1.1.6 could be presented as additional paragraphs to draft guideline 1.1.1 on the object of reservations, since they confirmed that a modification by way of a reservation invariably limited the obligations of the reserving State or organization.

Draft guideline 1.5.1 ("Reservations" to bilateral treaties)

86. It was pointed out that the guideline did not resolve the question of a statement formulated after the entry into force of a bilateral treaty. It might be interpreted as meaning that such a statement did in fact constitute a reservation.

Draft guideline 2.1.3 (Formulation of a reservation at the international level)

87. Uncertainty was expressed about the meaning of the term "at the international level" and its use. It was recalled that the Vienna Conventions did not contain such an expression and there seemed to be no justification for the creation of a novel legal concept. There was some doubt whether the Commission really intended to equate the formulation of reservations "at the international level" with the conclusion of a treaty, as the guidelines following draft guideline 2.1.3 seemed to suggest. The remaining part of the draft guideline did not seem to correspond with such an understanding. It was pointed out that the text of article 7 of the Vienna Conventions was used without taking into account that the various categories of organs referred to in the article were considered to be empowered in different ways: while heads of State, heads of Government and ministers for foreign affairs were considered to represent their State for the purpose of performing all acts relating to the conclusion of a treaty, heads of diplomatic missions and representatives accredited by States to an international conference or organization or one of its organs did so only for the purpose of adopting the text of a treaty. If the term "formulation of a reservation" was understood as producing an immediate legal effect, it was questionable whether representatives to international conferences should be empowered to perform such an act.

88. The view was expressed that a reservation could be formulated only by the State organ that was competent to conclude the treaty.

89. According to another view, draft guideline 2.1.3 was framed as if authority to formulate a reservation lay with a particular official instead of with the State as an element of its treaty-making power. (This observation was also valid for draft guideline 2.4.1 dealing with the formulation of interpretative declarations.) In verifying that a reservation emanated from the proper source, the depositary was in fact verifying the authority of the State. The text would be less contentious if it contained a reference to competence to *present* rather than *formulate a reservation*. Moreover, paragraph 2 did not seem to describe contemporary practice since depositaries had already resorted to less formal methods.

90. However, it was also observed that the draft guideline was in conformity with the prevailing practice among international organizations and with article 7 of the 1986 Vienna Convention.

Draft guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations)

91. It was pointed out that the violation of internal rules regarding the formulation of reservations should not have consequences at the international level as long as the reservations were formulated by a person representing the State or the international organization. Any irregularity with regard to internal procedures could be resolved by the State withdrawing the reservations.

Draft guideline 2.1.6 (Procedure for communication of reservations)

92. Many delegations were of the view that it would be anachronistic to ignore the current universal use of electronic mail and facsimile. Any misgivings about the possible loss of communications should be dispelled by the fact that a communication relating to a reservation, if made by facsimile or e-mail, must be confirmed by a diplomatic note. It was pointed out that reference should be made to its receipt rather than its despatch by the depositary. It would be fair to regard the earlier date of transmission of the e-mail or facsimile as the effective date of communication, provided that the confirming note arrived within a reasonable time. The Commission might wish to set up a time frame for the arrival of such confirmation.

93. It was observed that a decision should also be taken on how the guidelines should deal with the question of transmittal of objections to reservations. The date of formulation of the objection should be the date on which it was transmitted by the chosen electronic method, especially for a computation of time limits such as that referred to in article 20 (5) of the 1969 Vienna Convention on the Law of Treaties. The use of electronic communication would also entail allowing the use of similar methods in respect of the instruments of ratification or adherence containing the reservation. The guideline should clarify whether the possibility of using electronic means of communication referred to all communications relating to a reservation.

94. It was pointed out that the Commission should consider a provision to the effect that reservations and any interpretative declarations should be formulated in one of the authentic languages of the treaty.

95. Several delegations pointed out that they appreciated receiving notifications by electronic mail from the Secretary-General of the United Nations acting as depositary without seeing, however, any reason to set the starting point of the time limit for raising objections to a reservation earlier than the date of the written notification by the depositary. They also welcomed the flexible system proposed in the draft guideline based on the date of reception of the reservation by the State or international organization concerned. It might, however, result in some uncertainty regarding the date of entry into force of the treaty or of the effect of the reservation.

96. According to another view, the draft guideline did not seem to reflect the usual practice and in part raised issues of authenticity and verification. There was no need to allow reservations to be made by electronic mail or facsimile. There might, however, be circumstances in which such forms of communication could prove useful. In any case, the requirement that reservations must be confirmed by diplomatic note should be retained.

97. The need to ensure the authenticity of the facsimile and electronic mail should be duly considered, especially if such communications would begin to produce legal effects before their confirmation was received. The Commission should show great caution in addressing those issues in the Guide to Practice.

98. A suggestion was made to combine draft guideline 2.1.6 with draft guideline 2.1.5 (Communication of reservations) so as to place the description of the role of the depositary at the beginning of the section dealing with the communication of reservations.

99. It was also observed that since reservations were generally made at the time of ratification or accession and for that reason formed part of the communication of the relevant instrument, the issue raised in draft guideline 2.1.6 seemed to be irrelevant.

100. It was furthermore pointed out that draft guideline 2.1.6 followed the 1969 and 1986 Vienna Conventions.

Draft guideline 2.1.7 (Functions of depositaries)

101. The view was expressed that the wording of the draft guideline was not very clear, particularly with regard to the functions of the depositary, implying wider functions than the strict duty of the depositary to examine whether the reservation was in due and proper form. Moreover, the expression "due and proper form" was too vague.

Draft guideline 2.3.2 (Acceptance of late formulation of a reservation)

102. It was observed that as time limits were binding, in that they created direct legal consequences after their expiry, they should be carefully examined before they were mentioned in a non-binding legal instrument such as the draft guidelines.

Draft guideline 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty)

103. It was observed that the question of the date on which the withdrawal of a reservation produced legal effects merited further consideration. It was doubtful whether the State had a right to declare the retroactive effect of such withdrawal. Retroactivity could cause problems especially with regard to economic and commercial treaties.

Draft guideline 2.5.11 (Partial withdrawal of a reservation)

104. The view was expressed that the adoption of a more flexible approach to the question of partial withdrawal was in the interest of a more universal implementation of the treaty, although the whole question should be handled with care.

Draft guideline 2.5.12 (Effect of a partial withdrawal of a reservation)

105. It was pointed out that the text of a reservation resulting from a partial withdrawal might give rise to objections from States which had not objected to the original reservation and the draft guideline should allow for this possibility.

C. Unilateral acts of States

1. General comments

106. The point was made that unilateral acts had come to play an increasingly important role in the process of creating law and incurring international obligations; given the fact that they made international cooperation more efficient, it could be assumed that they would become increasingly common, and therefore codifying the relevant rules was important.

107. Some delegations shared the view that unilateral acts existed in international law and that they could constitute a source of obligations, as had been indicated by the International Court of Justice. In that connection, it was suggested that a study should be made of the possibility of ranking unilateral acts among the sources of international law. It was also stated that, although not norm-creating mechanisms, if sufficiently widespread, unilateral acts could be evidence of State practice and result in the creation of customary international law.

108. It was stated that the rapid completion of work on the topic of unilateral acts of States would help to establish universal practice, so that the use of those acts could become a means of regulating international relations. In that regard, it was suggested that when codifying such acts only those producing legal effects should be taken into consideration; in that endeavour the Commission should focus on identifying, through an analysis of international practice and scholarly writings, the criteria for distinguishing between the legal and the political elements of unilateral acts of States. The point was also made that there must be general rules for determining which unilateral acts could be binding.

109. It was noted that the conduct of a State as expressed through a unilateral act could produce legal consequences only after recognition by other States and provided that the act was consistent with peremptory and other norms of international law. It was also stated that the Commission should give special attention to the study of the legal effects of unilateral acts, especially those that sought to create obligations for third States.

110. It was pointed out that, unlike the case of treaties, the subjective intention of the actor State and the act itself were sometimes at odds; in addition, factors other than a State's intentions could come into play, and therefore the topic did not lend itself to the formulation of a regime.

111. The view was expressed that unilateral acts could be terminated only with the agreement of the subjects of international law which had taken them into account and modified their conduct accordingly.

112. Some delegations shared the view of the Special Rapporteur that all unilateral acts might be covered by some common rules; in that connection, the importance of identifying universally applicable general rules was noted.

113. Some delegations were of the view that although the Vienna Conventions of 1969 and 1986 had to guide the codification of the topic, automatic reference to them would be unwise. Among the obstacle to the application, mutatis mutandis, of the provisions of those Conventions was the fact that unilateral acts were complex and thus no analogy could be drawn with treaty norms that applied to inter-State agreements; furthermore, not all States had ratified the two Conventions, whereas any State could formulate a unilateral act. Nonetheless, it was felt that some provisions of the Conventions could be reflected in the future codification of unilateral acts, particularly in such areas as international and domestic effects, bona fide fulfilment of a unilateral obligation, rules regarding representation of States, the granting of authority, interpretation, invalidity, reservations, as well as the capacity of States, non-retroactivity and, in more limited terms, termination and suspension. On the other hand, provisions such as conclusion, entry into force, termination and suspension might well not be applicable to unilateral acts.

114. The view was expressed that, under international law, *pacta sunt servanda* was not regarded as the basis of a treaty relationship and that, consequently, it was not possible to share the proposal of the Special Rapporteur for a new concept, *acta sunt servanda*, as the legal basis for the binding nature of a unilateral act. Not every unilateral act created a legal obligation and hence no mechanism should be provided from which it might be inferred that a legal obligation had come into existence.

115. The point was made that the issue of whether a State which had unilaterally made a promise could be legally bound without expecting reciprocity on the part of any other States was particularly interesting, especially in relation to situations such as the promise by a requesting State not to apply the death penalty in order to obtain the extradition of an individual.

116. Some delegations expressed their concern about the direction of the Commission's work on the topic and also noted that the Special Rapporteur had not fully taken into account the constructive criticism made by Governments.

117. Doubts were also expressed about the suitability of the topic for codification and in that connection the suggestion was made that the Commission should suspend its study on the topic until it received more input from Governments. According to another view, the issue was not codification, but progressive development, taking account of the *lex ferenda* as well as the *lex lata*. The point was made that the discussion on the topic in the Commission had been inconclusive and in that connection scepticism was expressed as to the prospects for a successful codification.

118. With regard to the questionnaires sent by the Commission, it was stated that since State practice had not been set down in systematic fashion it was difficult to reply to them.

2. Classification of unilateral acts and scope of the topic

119. The view was expressed that the proposal by the Special Rapporteur to group unilateral acts into two categories was premature and that a further investigation of State practice was needed in order to determine whether such a division was compatible with the interpretation of and legal consequences attributed to the various types of "classic" unilateral acts.

120. The point was also made that the form of a unilateral act was relevant in relation to the effects of the act: should it have international effects, its form had to comply with the requirements of international law, while if it were to take effect in the domestic sphere, national law requirements had to be complied with. Since, therefore, international law did not impose specific formal requirements, no such procedural requirements should apply. Like treaties, unilateral acts must be interpreted in good faith, and the result of such an interpretation must not be contrary to law. Further consideration should, however, be given to the question whether, in cases of doubt, international tribunals should be requested to provide interpretations.

121. As regards the scope of the topic, some delegations were of the view that there was no need for a comprehensive set of rules; a study limited to general rules and some particular situations was suggested in that regard.

122. In relation to the definition of unilateral acts which was before the Drafting Committee, it was pointed out that the intention of a State to produce legal effects by means of a unilateral declaration might not suffice actually to produce such effects under international law. It was ultimately international law itself or a general principle of international law that could provide the binding force intended. Consequently, draft article 1 should make clear that unilateral legal acts could only be situated outside a treaty framework; this could be achieved with the addition of a phrase along the lines of "not constituting part of an agreement". Another suggestion for improving the text of draft article 1 was to incorporate the words "governed by international law".

123. According to another view, the reference in the definition before the Drafting Committee to "international organizations" as potential addressees of unilateral acts did not seem appropriate, since relations between a State and an international organization of which that State was a member were governed by a separate statute that had nothing to do with the legal framework of relations between States.

124. Support was expressed for specifying which authorities could engage a State's responsibility; in that connection it was stated that the relevant provisions of the 1969 Convention should be applied restrictively when extending the capacity of heads of Government and foreign ministers to others.

125. As regards the draft articles on invalidity proposed by the Special Rapporteur, it was stated that in the case of relative invalidity, the text should make it clear that an exceptional situation was involved. Thus, in the cases of error, fraud, corruption of the representative of the State and violation of a norm of fundamental importance to the domestic law of the State formulating the act, the relevant rules should begin by pointing out that the State in question "may not" or "shall not" invoke the grounds "unless" the requirements for each case were all met.

126. It was stated that the rules on interpretation of unilateral acts should be based on good faith and that the restrictive criterion should predominate, so that the State's only obligations should be those that it had unequivocally assumed. The rules of interpretation contained in the 1969 Convention also provided, mutatis mutandis, a frame of reference; however, the final wording should not be decided upon until all the other articles on unilateral acts had been drafted. In that connection, the view was expressed that reference to "preparatory work" did not seem appropriate in the light of the special nature of unilateral acts and the fact that the author State would decide what kind of background information could be provided.

127. The point was also made that draft article 7, as proposed by the Special Rapporteur, was of crucial importance and in keeping with the determination of the binding nature of unilateral acts by the International Court of Justice in the *Nuclear Tests* case. At the same time, the binding nature of unilateral acts was subject to conditions of validity and causes of invalidity.

128. It was also stated that any draft articles on the topic should embody the rule that unilateral acts were enforceable.

3. Approach to the topic

129. The view was expressed that the approach to the topic was misconceived. According to another view, the Commission's treatment of the topic was too theoretical and should instead focus on practical aspects.

130. Some delegations supported the Commission's decision to gather further information on State practice prior to making a determination on how to proceed. In that connection, support was expressed for the Commission's proposal to request outside private research institutions to conduct research into State practice.

131. According to a different view, it might be worthwhile to study practice, but it would encounter difficulties, such as the fact that States which carried out unilateral acts often preferred to leave it unclear whether they intended to contract obligations. Such ambiguity could be constructive, as in the case of States pledging contributions to voluntary funds of the United Nations. In some cases, it would be extremely inconvenient for States to raise the question whether particular unilateral acts created obligations for them. It was also proposed that the Special Rapporteur should concentrate first on those unilateral acts which, in recorded international practice, had culminated in obligations.

132. It was also suggested that, instead of examining general questions, work could proceed with the analysis of a specific category of unilateral acts, such as recognition, protest, waiver and promise. Subsequently, after identifying the common points and differences between the various categories, it would be feasible to proceed to identify the general rules that might be applicable. In that connection, it was stated that such general rules should not be detailed or exhaustive, but very basic and open to completion at later stages.

133. According to another view, however, the Commission should begin with the formulation of rules common to all unilateral acts and, subsequently, focus on specific rules for particular categories of such acts.

134. The point was made that the Commission should continue its consideration of the general and specific rules applicable to the various types of unilateral acts and to build on them in drafting a complete and coherent set of rules on the matter.

135. The suggestion was also made that the Commission could establish a set of minimum standards of conduct, which might eventually appear in the form of a General Assembly resolution containing non-binding rules that would help develop a uniform practice.

136. Support was also expressed for the Drafting Committee to take up some of the draft articles which had been referred to it, in particular the draft article containing the definition of unilateral acts.

D. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

1. General comments

137. Several delegations welcomed the resumption of work on liability aspects of the topic, following the adoption by the Commission of the completed text of draft articles, together with commentaries, on prevention of transboundary harm from hazardous activities, as well as the progress made on the topic by the Commission during its fifty-fourth session, including the establishment of a working group and the appointment of a Special Rapporteur.

138. In expressing support, some delegations stressed the need for continuity in the consideration of the topic, its relevance, the insufficiency of preventive measures once injurious consequences occurred, the inadequate guidance from prevention and domestic civil liability legislation, lacunae in international law meriting attention in order to provide prompt, adequate and effective compensation to innocent victims and the importance of international cooperative action to prevent and minimize transboundary harm, while others underscored the priority to be accorded the topic, noting that it would constitute a significant contribution to the codification and progressive development of international law. In addition, it was noted, in agreement with the observations made in the Commission, that the consideration of the topic was a logical extension of the Commission's work on prevention and on State responsibility and would be complementary to the completed work on State responsibility.

139. It was remarked that the very existence of a legal regime in this area would of itself, by encouraging operators to act with care, constitute a preventive measure. Additionally, it was noted that all operators engaged in hazardous activities, whether State or private, should increasingly recognize that the overall costs associated with accidents were so high that it was in their interest to institute state-of-the-art prevention techniques and follow continuous improvement procedures.

140. However, the point was made that while establishment, implementation, constant review and improvement of best-practice prevention techniques provided the best guarantee against harm arising from transboundary activities, work on liability and compensation was necessary since even the best attempts at prevention and response could never entirely eliminate the risk of accident.

141. Accordingly, it was considered important to establish rules to deal with cases in which an accident occurred and gave rise to transboundary harm despite prevention efforts or where prevention was not possible.

142. Other delegations, while emphasizing the relevance of liability, stated that they would have preferred that the draft articles on prevention be concluded by the General Assembly of the United Nations first before the liability aspects of the topic were embarked upon. In that connection, it was observed that the failure by the Assembly to adopt the recommendation of the Commission to elaborate a convention on the basis of the draft articles would undermine work concerning liability.

143. Noting the advantage of dealing with situations giving rise to injurious consequences on a case-by-case basis rather than elaborating rigid rules on the topic, the Commission was urged to focus on providing guidelines to be used by States to negotiate the allocation of loss.

144. A comment was made that international regulation on the topic should proceed through careful negotiation based on specific topics or regions, as had been the case with issues such as environment impact assessment, prevention and notification. In welcoming steps to support sectoral and regional efforts, it was pointed out that there was no perceived desire among States to develop a global liability regime.

145. Yet another view was expressed that the approach to the topic remained misconceived and that the work of the Commission at its fifty-fourth session, including on the proposed programme for dealing with the topic, had not led to any different conclusion.

146. It was also noted that many complex legal problems remained to be addressed before the Commission's work on the topic could be brought to a successful conclusion.

147. Although it was recognized, as the starting premise, that States should reasonably be free to carry out or permit activities within their territory or under their jurisdiction or control, it was acknowledged that such freedom was not unlimited.

148. Several delegations expressed their agreement with the basic considerations contained in the report of the Working Group. In that connection, the Commission was also urged to examine the work being carried out under the auspices of the Permanent Court of Arbitration at The Hague.

149. Some delegations also agreed with the understanding of the Commission that failure to perform the duties of prevention under the draft articles on prevention would entail State responsibility. However, some delegations also noted that international liability could arise if harm occurred even though a State had complied with its duties of prevention. It was also observed by others that, absent a causal link between non-compliance and the harm in question, not every case of non-compliance with a preventive measure would automatically render a State responsible. Thus, if compliance would not have prevented the harm, the State would not ipso facto be obliged to provide compensation.

150. The point was made that it was indeed far from clear whether the duty to compensate for harm arising from lawful hazardous activities by a State which had in fact performed its duty of prevention existed in positive law. It was asserted that while the principle of strict liability was accepted for certain specific regimes, such as damage caused by space objects, there was no evidence that the principle was part of customary international law.

151. Some delegations welcomed the emphasis placed on the allocation of loss among the various actors as a solution to addressing issues of liability. Although it had been decided to proceed from the assumption that damage could occur even where there was no breach of an international obligation and to provide relief therefor, the point was made that the term "allocation of loss" could give rise to misunderstanding. Under this view, the real issue was not the allocation of loss but the duty of compensation for damage suffered by others from liability which did not result from a breach of an international obligation.

152. In order to avoid prejudging the final outcome, it was remarked that it was not necessary to change the title of the topic until the nature and content of the Commission's work had been determined.

2. Scope

153. The fact that the Commission had confined its study to the question of compensation for losses caused was welcomed. It was observed that the study should not be further extended, nor should it deal with the liability of a State for failure to perform its duties of prevention. It was stressed that the Commission should take heed of the views of those States which were unwilling to accept any form of liability not derived from a breach of a legal obligation.

154. On the other hand, some delegations, while acknowledging that if loss occurred despite the fulfilment of obligations of prevention there was no wrongful act upon which a claim would be founded, considered it necessary that the Commission develop provisions for the exceptional situation which would ensure that innocent victims were not required to bear harm or loss.

155. Several delegations welcomed the fact that the topic would only cover activities included within the scope of the draft articles on prevention, as well as loss to persons, property and environment within the national jurisdiction of a State.

156. It was suggested that in its work the Commission should be guided by the need to maximize the opportunity for victims to receive adequate compensation and to restore the environment.

157. In addition, the point was made that the legal regime governing the topic should be in line with principle 13 of the Rio Declaration on Environment and Development. It was noted that the scope of the topic, in line with the precautionary and polluter pays principles, should also include the study of activities which were not per se hazardous but could cause transboundary harm. Similarly, a suggestion was made that non-economic loss should be included within the scope of the topic.

158. The view was furthermore expressed that the decision of the Commission to address the full range of activities covered by the draft articles on prevention would probably create difficulties since it was not certain that a uniform regime could cover all such activities.

3. Role of the innocent victim, the operator and the State in the allocation of loss

159. In the formulation of the draft articles on liability, including any regime covering loss, the Commission was urged to strive for a fair balance between the rights and obligations of the operator, the beneficiary and the victim. Such a regime should, as noted by the Commission, include not only States but also operators, insurance companies and pools of industry funds.

160. At the same time, it was noted that focusing on private operators and States would disregard other possible agents of economic activity. Thus, it was suggested that the term “operator” should be broadly defined to include all those engaging in a given activity.

161. The point was made, however, that organizations established under municipal law and non-governmental organizations should be excluded from the study of the topic.

162. The necessity of defining the liability rules applicable for the actors involved, especially States, was underscored.

(a) Degree to which the innocent victim should participate, if at all, in the loss

163. Several delegations agreed with the Commission’s basic consideration that the innocent victim should not, in principle, be left to bear the loss. It was pointed out that it would be manifestly unjust for victims, whether individuals or States, to bear the costs involved. It was conceded, however, that the situation would be different if the victim benefited in some way from the activity causing harm, or in exceptional circumstances where some blame or negligence might be attributable to the victim.

164. In that connection, it was pointed out that other relevant considerations included the need to take into account the degree of care of the individual concerned, as well as whether the victim had taken reasonable measures to mitigate the damage.

165. It was noted that the State should be responsible for losses caused by any failure to apply the rules of prevention, and as between two "innocent" States, the one responsible for the operator should bear the burden.

166. On the other hand, the point was made that there was no reason why the injured State should be responsible for the consequences of hazardous activities, irrespective of how the damage had been sustained. This followed logically from the proposition that the innocent victim should not be left to bear the loss.

167. The view was also expressed that the term "innocent" victim should be reviewed.

(b) Role of the operator

168. Several delegations agreed with the approach of the Commission that the operator should bear the primary liability in any regime for allocating loss, and that loss should be apportioned among the relevant actors through special regimes or insurance schemes.

169. The point was made that the focus should be on ensuring that the loss that occurred was compensated. On that account, the operator who had direct control over the operation would ultimately bear the loss, irrespective of whether it was a private or State operator, or without in any way reducing any liability of the State concerned.

(c) Role of the State

170. Delegations noted that where harm had been occasioned any liability of the State could only be secondary or residual to that of the operator concerned, applicable in exceptional circumstances for loss not covered by the operator, or the operator's insurance or other resources, or as in the case where activities giving rise to transboundary harm emanated from a foreign ship, or under specific circumstances even where no internationally wrongful act had been committed or as a last resort.

171. Others stressed the need to draw a distinction between the situation where the State itself was an operator, in which case it would bear primary liability, and the situation in which the State monitored the activities of the private operator. In the latter case, the State would bear residual liability if the operator could not afford full compensation, where compensation was inadequate or if it proved impossible to identify the operator concerned.

172. As in the Commission, the crucial role of States in designing appropriate international and domestic liability schemes for the achievement of equitable loss allocation was recognized, particularly where private liability would be insufficient to cover the entire damage caused; and the point was made that States should also participate in compensation through contributions to compensation funds.

173. Support was expressed for a careful study of liability regimes contained in multilateral treaties on environmental conservation, protection and management,

whether partially or insufficiently applied by States and international precedents in the field of liability, especially those relating to the role of the State and to civil liability, as well as of the work of other international forums.

174. While it was recognized that treaty-based liability regimes could provide some insight into the utility of treaty-based mechanisms, it was noted that it was debatable whether such mechanisms could be workable outside their specific regimes, and a point was made cautioning against taking as reference points legal instruments which had not been generally accepted, such as the Convention on the Law of the Non-navigational Uses of International Watercourses.

175. The view was expressed that the introduction of residual liability of a State would of itself encourage closer supervision of preventive measures by a flag State or port State where the operator or owner of a ship actually conducted activities. Thus, the Commission was urged to give closer attention to the situation where liability would arise from activities concerning a foreign ship as well as the concomitant preventive cooperative efforts of the flag State, the State of registration and, as appropriate, the port State.

4. Whether particular regimes should be established for ultra-hazardous activities

176. The point was made that the Commission should consider establishing a particular regime for ultra-hazardous activities and provide therefor a higher threshold for the duty of prevention.

177. On the other hand, it was observed that ultra-hazardous activities entailed particular care in prevention on the part of States, and where specific fields were involved such issues were best dealt with under applicable international agreements. In order to obviate the further fragmentation of international law, it was suggested that the Commission could usefully draw up an inventory of instruments under international law concerning liability, insurance schemes and funds, including those under current negotiation.

178. Considering that specific regimes in such areas as nuclear energy already existed, it was observed that the Commission should proceed on a broad front instead of restricting itself to dealing with hazardous or ultra-hazardous activities.

179. It was noted that, although ultimately there was scope for developing a regime to establish loss-sharing schemes, the Commission should focus for the time being on developing general principles, which would constitute a foundation for more detailed and activity-specific schemes.

5. The threshold for triggering the regime of allocation of loss

180. Support was expressed for retaining “significant harm” as the triggering threshold for allocation of loss. Such an approach was consistent with State practice and was reflected in various treaties. Any other approach would give rise to difficulties in obtaining compensation for transboundary harm.

181. Delegations stressed the need to retain the same threshold for liability and compensation as for prevention, whether it was “significant” or “serious”. It was also noted that the threshold should be sufficient to induce operators to follow best practice in prevention and response. Yet others emphasized that it was unnecessary to establish an initial trigger since under national law no general threshold applied

for purposes of compensation. It was conceded, however, that in the case of liability of a State, a threshold, not higher than "significant harm", in accordance with international law might be appropriate.

182. In addition, the hope was expressed that the Commission would opt for a low threshold or at any rate one below the perceptible level. A comment was also made favouring different thresholds for the various actors, such as mere "harm" for an operator and a non-State actor and "significant harm" for a State.

6. Inclusion of the harm caused to the global commons

183. Several delegations expressed support for the extension of the topic to include harm caused to areas beyond national jurisdictions, particularly where harm as a result of activities outside national jurisdiction had effects within the territory of a State. In support of that point, reference was made to principle 2 of the Rio Declaration, as well as to the Commission's acknowledgement in the commentaries on the draft articles concerning prevention that the environmental unity of the planet was not a matter of political borders.

184. The point was made that extension of the topic to issues beyond national jurisdiction, which should be a subject of current study, should not be confused with the different questions attendant to harm to the global commons.

185. Although the importance of addressing issues relating to the global commons was asserted, it was also recognized that the matter was not dealt with in the draft articles on prevention. Consequently, and in view of the variety of solutions found in different legal systems and traditions, it was suggested that the issue could probably best be dealt with under national law, while others considered it inappropriate to address it in the context of the current topic and preferred addressing it at a later stage.

186. Although inclusion of the complex concept would translate into an increased workload for the Commission, it was claimed that it was the responsibility of the Commission to study it at the current stage for the sake of present and future generations.

7. Models for allocation of loss

187. Noting that loss could take different forms, it was pointed out that the Commission should bear in mind that significant financial loss could result from physical consequences flowing from a particular activity whose probability of occurrence was low. It was cautioned that it would be a mistake to draw an automatic analogy with traditional national law tort and compensation regimes in view of the fact that in certain situations environmental damage materialize long after an incident had occurred.

188. Stressing the primary liability of the operator, and referring to a number of civil liability regimes, delegations alluded to the possibility of joint liability where several operators were involved, while also not precluding the possibility of claiming against third parties. The need to take into account third party involvement, force majeure and the impossibility of foreseeing harm or tracing its source with complete certainty was also highlighted.

189. The residual liability of the State if the operator could not afford full compensation, where compensation was inadequate or if it proved impossible to identify the operator concerned was also reiterated. In addition, the alternative possibility of establishing compensation funds along the lines of the International Fund for the Compensation of Oil Pollution Damage was advanced.

190. Other delegations stressed the role to be played by States in working out how loss would be shared among all the parties, taking into account such factors as the extent to which the State suffering the loss benefited from the activity or whether it had been consulted about or participated in the activity in question. Support was also expressed for the utilization of insurance schemes. It was pointed out, however, that the establishment of insurance schemes and funds should not result in a wider distribution of liability at the expense of the clarity needed for State liability. Some delegations expressed their preference for absolute liability as the basis for restoration and compensation, with the possibility of establishing maximum limits.

191. On the other hand, attempts to set limits on the share of the operator were cautioned against while seeing merit in the Commission's suggestion that schemes should be developed to ensure that operators internalized all the costs of their operations and consequently avoided the use of public funds for the compensation schemes.

192. Delegations also noted their agreement with the Commission that any regime on allocation of loss should ensure that effective incentives were in place for all involved in a hazardous activity to follow best practice in prevention, response and compensation. It was observed that compensation should cover all damage to persons and property, and that the scope of liability should encompass a duty to take appropriate response action on environmental damage, including clean-up where possible. Additionally, it was proposed that consideration should be given to whether and to what extent compensation should cover costs incurred by measures to mitigate or contain harm and, where possible, to restore the environment to the status quo ante.

8. Procedures for processing and settling claims of restitution and compensation

193. It was averred that the injured persons and entities should, as a general principle, be able to sue the operator. In that context, it was suggested that claims for transboundary harm should be brought before the national jurisdiction of the claimant's choice, either the State of origin, the affected State or the State of habitual residence of the respondent. It was also noted that all States should make provision in their internal law for domestic judicial remedies, which should be applied fairly without discrimination as to nationality, for prompt and adequate compensation for victims and restoration of the environment, as well as for recognition of final foreign judgements.

194. The observation was also made that the question of jurisdiction was a matter of private international law and should take into account factors such as the domicile of the operator and the location of the operation.

195. Finally, support was expressed for the establishment of international dispute settlement mechanisms for inter-State claims, including joint arbitration mechanisms and courts of arbitration.

E. Responsibility of international organizations

1. The Commission's decision to include the topic in its programme of work

196. A number of speakers expressed their support for the Commission's decision to include this interesting and timely topic in its programme of work in the light of the increasing number of international organizations, the expansion of their field of activities, their increasing autonomy as actors on the international stage as well as the many questions that arose regarding their responsibility, which made the topic of practical importance.

2. Report of the Working Group

197. A number of delegations also welcomed the Commission's decision to establish a working group and commented on its report.

(a) Scope of the topic

(i) The concept of responsibility

198. Several delegations were of the view that the topic should be limited to issues relating to the responsibility of an international organization for internationally wrongful acts, those which breached an international obligation of the organization in question, under general international law, and should therefore exclude liability for injury caused by activities that were not prohibited by international law.

199. In contrast, the view was also expressed that since the legal nature of international organizations was different from that of States, the topic of responsibility of international organizations should not be limited to responsibility for internationally wrongful acts. It was suggested that the question of their liability for acts not prohibited by international law should be considered alongside their responsibility for internationally wrongful acts under general international law. It was also suggested that this liability should be handled separately and by analogy with State liability for those acts, once the Commission's work on that subject was complete.

200. In terms of the approach to the topic, the view was expressed that work on the responsibility of international organizations should be based on the same premises as the articles on State responsibility, with a view to establishing general principles, and that the rules to be drafted by the Commission should be limited to matters of general international law, without referring to the conditions for the existence of a wrongful act. While the view was expressed that the topic should not cover special regimes established by particular instruments, it was also felt that special rules relating to specific international organizations or types thereof would be helpful in establishing more general rules of international law.

(ii) The concept of international organizations

201. A number of delegations were of the view that it would be preferable to limit the study to intergovernmental organizations, at least at the initial stage, in order to avoid complicating the task and enable the Commission to produce results in a timely manner. Non-governmental organizations and organizations established by States under their own internal law should therefore be disregarded. It was remarked

that intergovernmental organizations were more similar in structure to State actors and that extending the topic to other organizations would make it difficult to complete the work in a timely fashion, given the diversity of organizations and legal systems that would be involved. Concern was also expressed that expanding the topic to include the responsibility of non-governmental organizations might lead indirectly to their implicit recognition as subjects of international law, which currently they were not. At the same time, it was considered important to include treaty bodies established to monitor the implementation of treaties, especially those on human rights and the environment, which were performing an increasingly important role in international relations, given a general tendency to regard them in the same light as international organizations.

202. It was suggested that it would be useful for the Commission to develop the international law on the question, without forgetting the responsibility of other subjects of international law, given the following: international organizations possessed international legal personality and the capacity to participate in international legal relations. Third parties could invoke their responsibility for breaches of international obligations, under either customary or treaty law, and the same applied to the organizations themselves vis-à-vis third parties. Current legal theory applied to them the same rules as to States in respect of international responsibility. Article 74, paragraph 2, of the 1986 Vienna Convention appeared to endorse that position. The Commission's own commentary to the draft articles for that Convention pointed to a number of examples from international judicial practice, beginning with the 1949 advisory opinion of the International Court of Justice in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*, showing that international organizations had the right to claim compensation for injuries sustained by their officials in the course of their duties. The United Nations had itself entered into compensation agreements as a result.

203. Attention was drawn to the need to consider the definition of the term "intergovernmental organizations". While noting the difficulty in establishing a clear and definitive pattern applicable to all intergovernmental organizations, it was suggested that some basic elements, such as permanence, structure and functioning, could be valid for a general definition of such organizations. It was also noted that intergovernmental organizations were established by States by means of a treaty or other arrangement. In that regard, reference was made to the definition found in earlier conventions based on the work of the Commission, notably the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, in which the term "international organization" meant an intergovernmental organization. It was felt that there was no reason to enlarge the definition to include non-governmental organizations or other legal persons not constituted under international law.

(b) Relationship between the topic of responsibility of international organizations and the articles on State responsibility

204. The view was expressed that the present topic was not really new, being a logical extension of the Commission's work on State responsibility, and would provide a useful complement to those draft articles. It was said that the existence of articles on State responsibility would make it easier for the Commission to classify the concept of the responsibility of international organizations. It was also said that the basic rules the Commission had already established concerning the concepts of

responsibility and international organizations and the relationship between the responsibility of international organizations and State responsibility would guide the further examination of the present topic. At the same time, this was considered to be a challenging topic, for unlike States, each intergovernmental organization was a unique legal person, based upon the terms of its own constituent instrument and practices. Therefore, it would not be possible simply to apply the rules of State responsibility mutatis mutandis.

205. While recognizing that the work on the responsibility of international organizations should logically follow the approach used in considering State responsibility, it was emphasized that the two sets of draft articles should be considered as separate and independent entities and that cross-references between the two texts should be considered very carefully in each case. Although the two had much in common, the current study was independent and must necessarily be based on limited practice. Some of its aspects could be dealt with in the light of the articles on State responsibility or through progressive development, while still others would have to be disregarded. Attention was also drawn to the continuing debate in the Sixth Committee on the final form to be adopted for the articles on State responsibility.

(c) Questions of attribution

206. The importance of examining existing State practice and case law on questions of attribution of wrongful acts was emphasized. The view was expressed that the pre-eminent question would be the attribution of an internationally wrongful act to an international organization rather than to its member States. The answer to that question would be contingent upon the international legal personality of the organization. Not every international organization necessarily had an international legal personality and, in its absence, any international responsibility must devolve upon the member States. In that connection, attention was drawn to the *Reparation for Injuries a*dvisory opinion of the International Court of Justice (1949), in which the Court had held that the international personality of an international organization was determined both by its constitution and by its practice. The same considerations clearly applied when an internationally wrongful act was attributed to an international organization.

207. The view was also expressed that one important aspect was to identify when the conduct of an organ of an international organization or other entity could be attributed to the organization. In many cases the rules for attribution would be similar to those in force for States, but there might be specific instances, such as peacekeeping operations, where a State was acting on behalf of an international organization. In other instances, authority might be conferred on the organization by its member States, or the conduct might be that of an official seconded to an international organization.

(d) Questions of responsibility of member States for conduct that is attributable to an international organization

208. The question of the responsibility of States members of an international organization for the conduct of the organization was considered to be one of the most complex aspects of the topic, which required special attention. It was considered important to examine existing State practice and case law on the question

of responsibility of member States for conduct attributed to an international organization. The suggestion was made that the Commission should begin by analysing relevant practice, although current practice was not always relevant. The cases concerning the International Tin Council, mentioned in paragraph 487 of the report, involved detailed discussion of the joint or subsidiary responsibility of States members of an international organization, if only as a question of national law. Other relevant instances included the decisions of human rights bodies concluding that States were responsible for human rights violations of international organizations of which they were members, even if the acts themselves were attributable to the international organization in question. Reference was also made to the judgement in the *Matthews* case before the European Court of Human Rights, involving the voting rights of residents in Gibraltar, and findings of the United Nations Human Rights Committee to the effect that States parties to the International Covenant on Civil and Political Rights remained responsible in all circumstances for adherence to all articles of the Covenant.

209. Attention was drawn to the debate currently taking place in the literature on whether member States could be responsible for the activities of international organizations. Attribution of conduct in that case would give rise to awkward problems with regard to whether there was a joint or a joint and several responsibility or whether the member States' responsibility was only subsidiary. The responsibility of member States in the case of dissolution of an international organization was also important in that context. It was suggested that those situations should be examined by the Commission from the standpoint of the progressive development of international law.

210. In addition, the view was expressed that the joint commission of internationally wrongful acts by several member States should not exempt individual States from responsibility, even though international organizations were themselves subjects of international law.

(e) Other questions concerning the responsibility of an international organization

211. The view was expressed that the draft articles on State responsibility could provide useful guidance with regard to other aspects of the topic, such as the responsibility of an organization in connection with the acts of another organization or a State and circumstances precluding wrongfulness.

(f) Questions of content and implementation of international responsibility

212. The view was expressed that the draft articles on State responsibility could provide useful guidance with regard to questions of content and implementation of international responsibility. It was noted that the Commission would need to consider who would be entitled to invoke responsibility on behalf of the organization and the question of countermeasures to be applied in areas not falling within the purview of the organization, when the breach was committed not against the organization, but against the member State. Given the complexity of those issues, the Commission should leave open the possibility of considering matters relating to the implementation of responsibility of international organizations.

(g) Settlement of disputes

213. It was suggested that consideration should be given to the possibility of filling the serious gaps in the responsibility regime for international organizations by appropriate provisions for dispute settlement. The view was expressed that an effective dispute settlement mechanism was a sine qua non of a well-functioning legal regime of State responsibility, and the same applied to the regime of responsibility of international organizations. Support was expressed for the adoption of an international convention on the topic, including appropriate procedures for dispute settlement.

(h) Practice to be taken into consideration

214. The view was expressed that a considerable amount of relevant national jurisprudence could be usefully studied. It was considered particularly important to examine existing State practice and case law on the questions of attribution of wrongful acts and the responsibility of member States for conduct attributed to an international organization.

F. Fragmentation of international law: difficulties arising from the diversification and expansion of international law

1. General comments

(a) Support for study of the topic

215. Several delegations welcomed or took note of the decision of the Commission to include the topic in its long-term programme of work, as well as the progress made by the Commission during its fifty-fourth session, despite an acknowledgement by some that the topic was a marked departure from and went beyond the Commission's traditional approach in the codification and progressive development of international law.

216. It was noted that the topic was of great current interest and had become increasingly relevant with the proliferation of new international norms, regimes and institutions, the expansion of legal regulation, the autonomy of certain legal regimes and forms of cooperation as well as the possibility of conflicts, at substantive and procedural levels, between various fields of law. Additionally, it was stated that the phenomenon was a natural consequence of the expansion of international law in a fragmented world and resulted from its diversification and progressive extension into new areas which had previously been considered unsuitable for international regulation, as well as the "regionalization" of international law, in particular in such areas as human rights, international trade and environmental protection. Others attributed the process to legal regimes on the same subjects emerging from different sources, notably treaty relations between States and the increased role of various rule-making bodies.

217. The view was expressed that the multiplication in the number of international jurisdictions sometimes with overlapping competencies and the absence of a homogeneous system of international law could lead to contradictory legal regimes and judicial decisions, creating instability in international relations. However, it was pointed out that rules of international law for solving problems of that nature could

be found and, by studying the fragmentation of the system, the Commission would sensitize States to the issues involved. It was acknowledged that the consideration of the topic would strengthen the rules, regimes and institutions of international law. Concomitantly, it was pointed out that a series of studies on the topic would not only promote awareness of international law and its fundamental organizational role in international activities but also assist international judicial institutions and practitioners of international law in dealing with the conflicts between rules and jurisdictional issues that arose in many fields.

218. Several delegations highlighted the fact that the process of fragmentation had both positive and negative aspects. Accordingly, it was emphasized that the topic should not be approached from too negative a viewpoint, or be limited to the negative effects or aspects alone, but should also address positive ones. While it was also pointed out that the topic could address the growing concern about the possible negative implications arising from the expansion of diversification of international law, the view was expressed that the topic should focus primarily on the problems and risks of fragmentation, or be examined from the perspective of the consequences of fragmentation for the efficiency of contemporary international law. It was also suggested that the aim of the study should be to gain an insight into the problems associated with the topic.

219. Some delegations noted that it was not necessarily the case that diversity was a bad thing, as might be suggested by the title of the topic, or that fragmentation was undesirable. Indeed, other delegations welcomed the more positive orientation of the topic, as indicated in the change in the title from “risks” to “difficulties” and the added reference to “diversification”.

220. The point was also made that, far from being unhealthy, the proliferation of international legal judicial institutions, rules and regimes was an indication of the vitality and versatility of international law.

221. Despite the importance of the topic and the change of approach as evidenced by the change in its original title, some delegations continued to express doubts as to the viability of the study, to share concerns about its scope and the final form that it would take, particularly on account of the complexity of certain aspects of the topic and misgivings as to whether its consideration would lead to the codification and progressive development of international law. In that regard, it was suggested that the Study Group on Fragmentation of International Law should prepare a concrete analysis of the rationale for the study and the specific aspects to be considered. The point was made that the approach to be taken in the proposed study should be a subject of further discussion. Doubts were also expressed as to whether any practical results could be achieved from the study of the topic.

222. Although it was noted that the phenomenon was not entirely new, it was acknowledged that there had been little academic research on it. At the same time, it was stressed that the Commission should not simply duplicate the kind of work that could be done equally well in academic institutions or work already done or under consideration by other working groups.

223. The attention of the Commission was drawn to the work being done and studies initiated by the International Federation of the Red Cross and Red Crescent Societies in responding to the fragmentation of international law in the area of international disaster response, particularly in promoting international disaster

response law. It was indicated that the outcomes of such work would be presented at the International Conference of the Red Cross and Red Crescent to be held in Geneva in December 2003 and that States and the United Nations system would be apprised of developments.

(b) Methodology and format of work

224. Several delegations concurred in the view of the Commission that the topic did not lend itself to codification leading to a set of draft articles or a text with direct formal force. It was suggested that it should appropriately be addressed in a series of studies or seminars. In that connection, the view was expressed that the Commission should act on the proposal contained in the report of the Study Group for the organization of a seminar to gain an overview of State practice as well as to provide a forum for dialogue.

225. While it was readily recognized that the topic could not reasonably be addressed in the form of draft articles, some delegations expressed the wish that the Commission would transcend a mere descriptive analysis of the processes of fragmentation and delve into the practical problems caused by such processes, offer practical solutions or proposals therefor and provide useful guidance to States as well as guidelines for practitioners. The view was stated that in analysing the existing problems and suggesting practical solutions the Commission could make a valuable contribution in the coordination and harmonization of the various regimes and in promoting greater synergies and cooperation between the institutions and actors involved.

226. Positing the possibility of prioritization, it was suggested that the study should first assess both the positive and the negative effects of fragmentation on the efficiency of international law; subsequently, the Commission should identify ways of encouraging its positive results and counterbalancing it with its negative effects. It was also suggested that as a first step the Commission could undertake a comprehensive survey of the rules and mechanisms dealing with possible conflicts of norms to be found in relevant international instruments, followed by an analysis of the rules of general international law, especially the relevant principles of the law of treaties, to determine whether they were still adequate in the light of recent trends in international regulation, where in fields such as environmental and economic law regulations were increasingly taking on the character of self-contained regimes. In addition, the view was expressed that the Commission should focus on identifying existing structures and procedures for dealing with conflicts of norms and determining how they could be adopted to fill the existing gap in the hierarchy of international norms.

227. Several delegations agreed with the Commission's approach that it should not for the time being deal with questions of the creation of or the relationship among international judicial institutions, including the choice of judicial forum. It was contended that such institutions assisted in furthering the supremacy of international law in inter-State relations and as such their setting up should not be called into question.

228. At the same time, it was noted that the rapid development of international law, the diversification of international legislation, the establishment and proliferation of international judicial bodies and the operation of treaty-monitoring mechanisms had a significant impact and created serious problems for the unity and coherence of

international law. Consequently, the resulting challenges to certain norms and legal frameworks, giving rise to divergent and incompatible interpretations of international law, largely in order to take into account customary law, warranted in-depth consideration, and support was expressed for the Commission to address particularly aspects concerning the unity and coherence of international law in the consideration of the topic, shedding light on both the advantages and the disadvantages of having a plurality of judicial bodies. In that regard, it was noted that the Commission's work would assist international judges and practitioners in coping with the consequences of proliferation.

229. Several delegations also expressed support for the Commission's view that it should not act as a referee in the relationships between institutions, pointing out that the Commission could consider how closer cooperation between such institutions might narrow the divergences in their interpretation and application of norms of international law. In that connection, the view was expressed that the International Court of Justice could play a useful role in establishing a uniform approach in the implementation of such norms by the various institutions; and that the Commission could study ways in which that could be done.

2. Comments on the recommendations of the Commission

230. Several delegations found the areas suggested for exploration by the Study Group interesting, well chosen and the decision to approach the issues from the point of view of the law of treaties well founded and of practical value. Some delegations specifically welcomed the inclusion of the treaty law topics recommended. It was pointed out that the function and scope of the *lex specialis* rule and the question of "self-contained regimes" were at the core of the problems to be studied, considering also that increasing specialization and "topic autonomy" created uncertainty as to the standards to be applied.

231. However, the view was expressed that although the Vienna Convention on the Law of Treaties was considered to be the starting point for deliberation, the study should also include customary law.

232. It was also noted that it would be useful to provide clarification of article 30, article 31, paragraph 3, and article 41 of the Vienna Convention.

233. Other delegations expressed their approval of the Commission's recommendation to study hierarchy in international law — *jus cogens*, obligations *erga omnes*, and Article 103 of the Charter of the United Nations as conflict rules — noting that the concept of peremptory norms or *jus cogens* required authoritative elaboration. In that regard, the Commission's attention was drawn to relevant material in document A/CN.4/454, containing outlines prepared by members of the Commission on selected topics of international law. It was also noted that such a study was not only of considerable theoretical interest but also of practical value, as shown in recent problems concerning the compatibility of counter-terrorism measures with human rights law. In particular, it was observed that although the issues involved — *jus cogens*, *erga omnes* obligations and Article 103 of the Charter of the United Nations — would broaden the focus of the study, the extra work would be worthwhile.

234. Several delegations commended the proposed work plan and the priority given to the topic the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

G. Other decisions and conclusions of the Commission

235. Comments on specific new topics selected by the Commission are covered under the relevant sections dealing with those topics.

236. Very few delegations commented on the topic of "Shared natural resources". Those delegations that did so generally supported the study of the topic. A concern expressed with regard to the appropriateness of the title of the topic. According to another view, the topic should be limited to the issue of groundwater as a complement to the past work of the Commission on transboundary waters; however, other areas of transboundary resources were not ripe for consideration. Apart from the area of transboundary watercourses, real conflicts rarely arose between States, and when they did, practical accommodations suitable to the specific situation had been reached. According to this view, an effort to extrapolate customary international law from that divergent practice would not be a productive exercise.

237. A view was expressed supporting the Commission's position on the issue of honoraria.

238. A view was also expressed endorsing the remarks by the Chairman of the International Law Commission regarding the high standard of work of the Secretariat and asserting that the quality of support received must not be allowed to deteriorate.